ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 2000-O-12

DATE ISSUED: October 17, 2000

ISSUED TO: Scott Solem, Attorney, Beulah Public School District

CITIZEN'S REQUEST FOR OPINION

On July 31, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jack McDonald on behalf of the Beulah Beacon asking whether the Beulah Public School District violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session which was not authorized by law and by failing to follow the statutory procedures for holding an executive session.

FACTS PRESENTED

According to the Beulah Public School District (District), criminal charges ranging from Class A misdemeanors to Class B felonies are pending against three individuals who are accused of breaking into and vandalizing the Beulah Public School in early March of this year. Estimates of the damage to the school exceed $250,000. Prompted by an inquiry to the attorney for the District from an attorney representing one of the defendants, a conference call was held on July 10, 2000. Participating in the call were the Mercer County State's Attorney, the attorney for the District, the president of the Beulah Public School District Board (Board), and two administrators for the District.

The conference call involved a discussion of the potential sentences in the pending criminal cases and how a plea bargain would work. In its response to the opinion request, the Board indicated that the people participating in the conference call specifically discussed the likelihood of restitution to the District for the damage caused by the defendants and conversion of any criminal judgment to a civil judgment in favor of the District and its insurance companies. It was agreed that the agenda of the next Board meeting would include a discussion of the position the Board would take, if any, regarding the terms of a plea agreement.

During its regular meeting on July 20, 2000, the Board held an executive session to consult with its attorney about the pending criminal charges and on whether to take a position on behalf of the District, as the victim of the crimes, on the terms of a plea agreement. The executive session lasted approximately 75 minutes and was recorded in compliance with N.D.C.C. § 44-04-19.2(5). After the executive session, the Board reconvened in an open meeting and

announced that it had instructed its attorney to send a letter to the State's Attorney expressing what the Board would support as sentencing recommendations in any plea offer. The District's attorney has advised this office that he sent the letter as instructed and that a copy of the letter has been made available to the public.

The recording of the executive session has been provided by the District and reviewed by this office.

ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-19.2 by failing to announce the topics to be discussed during the executive session.

2. Whether the executive session of the Board was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSES

Issue One:

Before holding an executive session, a governing body must identify the legal authority for the session and the topics to be considered during the session. N.D.C.C. § 44-04-19.2; 2000 N.D. Op. Att'y Gen. O-43 (July 19 to Howard Swanson). The request for this opinion alleges that the Board failed to identify the topics or legal authority for the session. In its response to the opinion request, the Board provided a copy of the minutes of the July 20 meeting which state that a member of the Board "moved to go into Executive Session as per N.D.C.C. 44-04-19.2(1) and 44-04-19.1(2)(4) to consult with School Attorney, Scott Solem, concerning the legal action in the March 1, 2000 High School Vandalism." This office confirmed, in a telephone call with the District's attorney, that the minutes accurately describe the announcement which was made.

Under N.D.C.C. § 44-04-21.1, we will not question the District's description of the announcement it made prior to the executive session. 2000 N.D. Op. Att'y Gen. O-12, O-14 (Mar. 15 to Larry Gegelman). As indicated by the District, the announcement included both the state law authorizing the executive session and the topic of the session, i.e. "legal action in the March 1, 2000, High School Vandalism." Therefore, it is my opinion that the Board's announcement of the legal authority and topics of its executive session, as described in the minutes of the meeting, was sufficient under N.D.C.C. § 44-04-19.2.

Issue Two:

The Board is relying on the exception in N.D.C.C. § 44-04-19.1(2) for attorney consultation as the legal authority for its executive session. "Attorney consultation" is defined as

> any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.

N.D.C.C. § 44-04-19.1(4).

"For discussion between a governing body and its attorney to be 'attorney consultation,' the discussion must be directly related to the pending or reasonably predictable litigation." 1999 N.D. Op. Att'y Gen. O-20, O-21 (Apr. 22 to Gregory Lange). The recording of the Board's July 20 executive session reveals that the closed portion of the meeting was limited to receiving and discussing the advice of the District's attorney regarding possible sentences and plea agreements in the pending criminal litigation against the three defendants. If the District, rather than the Mercer County State's Attorney, were prosecuting the defendants, there would be no question that the executive session was authorized under N.D.C.C. § 44-04-19.1. However, because the District is the victim of the criminal acts, rather than a party to the pending criminal litigation, there is a question whether the District can invoke the open meetings exception in N.D.C.C. § 44-04-19.1 for "attorney consultation."

This office is not aware of any prior attempts to close a portion of a meeting for "attorney consultation" under N.D.C.C. § 44-04-19.1 when the public entity was not a party to a pending adversarial administrative proceeding or court case or expecting to be a party to an imminent or reasonably predictable proceeding or court case. Although N.D.C.C. § 44-04-19.1(4) requires that the attorney's advice concern a pending court case or administrative proceeding, the District's attorney correctly observes that the plain language of the definition of "attorney consultation" does not require that the public entity be, or anticipate being, a party to the case or proceeding. He asserts that an attorney's advice to a public entity may "concern" a pending court case even if the entity is not a party to the case.

Taken to the extreme, this interpretation would allow a public entity to hold a closed "attorney consultation" to receive its attorney's advice about a pending case in which the public entity had no interest other than idle curiosity.

Because the open meetings law is construed liberally in favor of the public's right to see how its business is conducted, the exception to the open meetings law for "attorney consultation," like other exceptions, should be construed narrowly to further the specific intent of the Legislature in enacting the exception. See Hovet v. Hebron Public School Dist., 419 N.W.2d 189, 191 (N.D. 1988). The practice among public entities in North Dakota, which is consistent with the legislative history of the original 1989 enactment of N.D.C.C. § 44-04-19.1, has been to apply the "attorney consultation" exception only in instances when having a discussion with the entity's attorney in an open meeting could have an adverse effect on the entity's legal interests in a pending or reasonably predictable case or proceeding. This office has previously observed that the line separating "attorney consultation" from simple participation in a meeting by the public entity's attorney (which may not be closed) will "frequently be drawn at the point where the public entity's bargaining or litigation position would be adversely affected if the discussion occurred in an open meeting." 1999 N.D. Op. Att'y Gen. at O-22.

The question of whether the District needs to be a party to a pending case or proceeding in order to close a meeting for "attorney consultation" under N.D.C.C. § 44-04-19.1 would not have arisen if it were a private entity. For private clients, the right of confidentiality extends to all information relating to representation of the client. N.D.R. Prof. Conduct 1.6. For government clients, however, attorney work product and consultation are closed to the public only if the record or consultation concerns the attorney's advice, mental impression, conclusion, litigation strategy, or legal theory about a pending or reasonably predictable court case or administrative proceeding. N.D.C.C. § 44-04-19.1(3), (4). This is reiterated by the statement in the definition of "attorney consultation" that participation by an entity's attorney in a meeting is not per se attorney consultation. N.D.C.C. § 44-04-19.1(4). The North Dakota Supreme Court rule regarding attorney-client confidentiality allows for disclosures which are required by law. N.D.R. Prof. Conduct 1.6(g). See also N.D. Const. art. VI, § 3 (court is authorized to regulate attorneys "unless otherwise provided by law"). In short, the right of a government entity to

confidentiality in its relationship with its attorney is quite different from the right of private clients.[1]

Although the District is not a "party" in the criminal litigation, it certainly has a legal interest in the case, both as the victim of the crimes for which the defendants are being prosecuted and as a potential plaintiff in a civil action to recover damages from the defendants for the vandalism. In fact, N.D.C.C. ch. 12.1-34 gives the District numerous rights as the victim of the crimes, including the right to make a victim impact statement which states the District's opinion "of the need for and extent of restitution." N.D.C.C. § 12.1-34-02(14). Both the Mercer County State's Attorney and the attorney for one of the defendants have recognized the District's legal interest in the pending criminal litigation by asking for its consideration of a potential plea bargain.

The recording of the executive session reveals, as suggested by the District's attorney in response to the request for this opinion, that that Board was greatly concerned with the restitution it expected the defendants to be required to pay and whether such restitution could be collected. The Board was also concerned with the potential non-financial aspects of any plea bargain such as length of time in jail and whether community service would be required.

Under state law, the District plays a role in determining the appropriate sentence for a convicted defendant. The firmness of the Board's resolve on the punishment of the defendants, or willingness to support a plea bargain, are facts which, if known to the defendants, could hinder the state's attorney's plea negotiations with the defendants. This hindrance, in turn, could negatively impact the District's legal interests in the prosecution.

Statutes are construed, where possible, to give effect to every word. N.D.C.C. § 1-02-38. The definition of "attorney consultation" expressly refers to criminal litigation as well as civil litigation and administrative proceedings. Since criminal cases in North Dakota are prosecuted by individuals (attorney general, state's attorney, or city attorney) rather than by governing bodies, one would have to

[1] The rules of the North Dakota Supreme Court also provide for an evidentiary privilege in court proceedings for confidential attorney-client communications. Nothing in N.D.C.C. § 44-04-19.1 suggests that the Legislature has intended to waive this privilege on behalf of the public as the client of a government attorney. However, an evidentiary privilege in a court proceeding is significantly different from a requirement of confidentiality outside a court proceeding. See Trinity Medical Center v. Holum, 544 N.W.2d 148, 156 (N.D. 1996).

wonder what kind of "attorney consultation" regarding a criminal case could be closed other than a meeting in which a governing body had a legal interest in the case but was not a party.

Of additional significance is the fact that any restitution obligation arising out of the case can be docketed as a civil judgment in favor of the District. N.D.C.C. § 12.1-32-08. Although it would have been better for the District to include in its announcement of the executive session that its attorney's advice was also going to concern a reasonably predictable civil action by the District against the defendants, it is clear that the District's legal interests as a potential plaintiff in a civil action were intertwined with its interest in the criminal case prosecuted by the Mercer County State's Attorney.

Because the definition of "attorney consultation" in N.D.C.C. § 44-04-19.1(4) does not include a requirement that the public entity be a party to the pending or reasonably predictable court case or administrative proceeding on which it receives its attorney's advice, I believe the legal interests of the District in this case are sufficient to satisfy the requirements for attorney consultation. Because the legal interests of the District would be negatively affected by receiving and discussing its attorney's advice about the pending criminal litigation in an open meeting, it is my opinion that the District was authorized to hold a closed meeting under N.D.C.C. § 44-04-19.1 in this situation.[2]

CONCLUSIONS

1. The Board's announcement of the authority and topics to be discussed during the executive session was sufficient under N.D.C.C. § 44-04-19.2.

2. The Board's executive session was authorized by law and limited to the authority and topics announced during the open portion of the meeting.

Heidi Heitkamp
ATTORNEY GENERAL

[2] In light of this conclusion, it is not necessary to consider the District's additional reliance on N.D.C.C. § 44-04-19.1(7) as legal authority for the executive session. This additional authority was not included in the District's announcement prior to the executive session.

Assisted by: James C. Fleming
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